CIVIL CIPA: A DEFENSE AGAINST THE GOVERNMENT'S UNCHECKED STATE SECRETS PRIVILEGE

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INTRODUCTION

In 1765, Founding Father John Adams urged the American people to protect their right to knowledge concerning their government in order to guarantee the preservation of their liberties within its framework. He claimed that "liberty cannot be preserved without a general knowledge among the people" of their governing body.[1] The Founding Fathers embedded the principles of fairness and openness in the system of American democracy to protect the individual liberties of American citizens from a too powerful government. By establishing three branches of government—judicial, legislative, and executive—the Founders aimed to ensure government legitimacy through a system of checks and balances.

To this day, Americans continue their fight to protect their liberties by striving for government transparency. While the American government was founded on a

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1. DAVID MCCULLOUGH, JOHN ADAMS 620 (2001); *see also* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 140 (2006).

system of checks and balances among the judicial, executive, and legislative branches, the separation of powers has not always guaranteed success in ensuring fairness and government transparency. Recent decades have revealed tension between the government's three branches as the judiciary has, on occasion, allowed the executive to prevent national security information from disclosure in judicial proceedings.[2] The executive branch's assertion of its evidentiary state secrets privilege in judicial proceedings has disrupted the constitutional system of checks and balances between government branches. "[T]he government's need for secrecy" in judicial proceedings often trumps "the plaintiff's right to pursue a judicial remedy"—creating an unchecked privilege of executive power over the judiciary.[3] The conflicting interests of the executive and the judiciary have been increasingly challenged as recent technology has eased the availability of information and the efficiency of its spread.

In cases involving a plaintiff's request for classified information to be disclosed at trial and the executive's assertion of the state secrets privilege, courts often favor evidentiary protections for the executive over the plaintiff's request for disclosure. Courts often grant the executive privilege over the judiciary's fair trial procedures by allowing the executive to prevent discovery in cases involving matters of national security. The Ninth Circuit has ruled that circumstances exist where courts must "act in the interest of the country's national security to prevent the disclosure of state secrets" from entering discovery.[4] But, by allowing the executive to raise an unchecked evidentiary privilege against the disclosure of government secrets in judicial proceedings, the judiciary facilitates an unconstitutional imbalance of the separation of powers that is contrary to the Fifth Amendment's guarantee of a citizen's right to due process and a fair trial.[5] In *United States v. Zubaydah*, for example, the Supreme Court recognized that, in cases involving state secrets, courts may allow the government "to prevent disclosure of information when that disclosure would harm national security interests", and, in some instances, courts may dismiss the case entirely.[6] However, when the state secrets privilege is invoked by the government, the plaintiff is denied his Fifth Amendment right to due process and a fair trial as he is unable to present his case with the necessary classified evidence.

The executive's invocation of the state secrets privilege in judicial proceedings allows the government to assert an unchecked defense to protect its clandestine work

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2. GEOFFREY S. CORN ET AL., NATIONAL SECURITY LAW AND THE CONSTITUTION 672–73 (2016).

3. *Id.* at 672.

4. Husayn v. Mitchell, 938 F.3d 1123 (9th Cir. 2019), *rev'd sub nom.* United States v. Zubaydah, 142 S. Ct. 959 (2022).

5. U.S. CONST. amend. V (No one shall "be deprived of life, liberty, or property, without due process of law"). The separation of powers were written into the Constitution as a system of checks and balances to ensure government legitimacy and the liberty of the American people through openness and fairness. *See id.* art. I, § 1, art. II, § 1, art. III, § 1.

6. *Zubaydah*, 142 S. Ct. at 961, 971 (2022) (quoting United States v. Reynolds, 345 U.S. 1, 10–11 (1953)).

and military secrets in the judicial process.[7] This unchecked defense and blanket closure of evidence from discovery can result in overclassification of government information, as well as the unnecessary and unfair prevention of discovery that can be essential to a plaintiff's case against the government. While the state secrets privilege seeks to protect the American government's national security secrets, the boundless evidentiary privilege has left American citizens injured by improper intelligence or national security actions with no means of redress.

Congress should address the problems created by the state secrets privilege, as courts currently apply it, by enacting a defense against the government's boundless assertion of the evidentiary national security privilege. This Note addresses the issue in four parts. Part I provides a history of the state secrets privilege and the seminal cases on the privilege—*Totten v. United States*[8] and *United States v. Reynolds*[9]—and their progeny. Part II addresses the legal tests, under *Reynolds and El-Masri v. United States*,[10] that courts must follow when reviewing a state secrets privilege claim. Part III addresses the problems with the state secrets privilege by analyzing three issues. Section III.A examines how the state secrets privilege is too easy for the government to raise. Section III.B explains how the government can assert the evidentiary privilege and dismiss a case without providing any defense or remedy for the injured plaintiff. Last, Section III.C explores how state secrets privilege's deference to the government encourages bad conduct by the executive.

Part IV addresses a possible legislative solution that should be adopted by Congress to provide a defense for plaintiffs when the government invokes the state secrets privilege. Currently, no judicial defense or legislative solution exists to protect the due process rights of plaintiffs who oppose the government when the state secrets privilege is invoked in civil cases. Legislation does, however, exist to protect defendants from having their cases dismissed in criminal proceedings when trying to admit classified information into discovery. The Classified Information Procedures Act ("CIPA") protects and guarantees parties' due process rights in criminal cases.[11] The CIPA allows the disclosure of classified information during cases to ensure parties can proceed fairly through the judicial process. Congress should enact a "civil CIPA"—a legislative defense for plaintiffs and trial procedures for courts to follow when the executive abuses its assertion of its state secrets privilege in civil cases. A civil CIPA would protect injured plaintiffs' rights to relief by creating a defense against the government's unchecked application of the state secrets privilege.

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7. *See id.* at 967; *see also Reynolds*, 345 U.S. 1, *rev'g* 192 F.2d 987 (3d Cir. 1951), *aff'g sub nom.* Brauner v. United States, 10 F.R.D. 468 (E.D. Pa. 1950).

8. Totten v. United States, 92 U.S. 105 (1876).

9. *Reynolds*, 345 U.S. at 1.

10. El-Marsi v. United States, 479 F.3d 296 (4th Cir. 2007).

11. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025, 2025 (1980) (codified at 18 U.S.C. app. §§ 1–16 (2018)).

In sum, this Note outlines the history of the state secrets privilege and the problems of the common law evidentiary privilege. This Note also provides a possible legislative defense framework, or civil CIPA, that could be followed by parties when the government invokes the state secrets privilege.

I. HISTORY OF THE STATE SECRETS PRIVILEGE

The United States democracy was premised on the principle of government transparency—the belief that Americans must be informed of the activities of their government in order for the republic to prosper. Throughout American history, however, to protect national security, the federal government has required that certain information remain classified "to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations."[12] In judicial proceedings, the government has often been able to protect classified information from becoming public by invoking its evidentiary state secrets privilege.

The privilege evolved as judge-made law as a defense for the government to protect classified information from disclosure in trial. In 1876, the Supreme Court developed the so-called *Totten* bar in *Totten v. United States*, which allowed the government to limit discovery or win dismissal of a case entirely due to public policy concerns.[13] Almost a century after the *Totten* bar was introduced, the Supreme Court developed the modern state secrets privilege in *United States v. Reynolds* to protect the government's national security secrets by allowing the executive to dismiss civil cases that would likely disclose military or state secrets during the judicial discovery process.[14]

In *Totten*, the Court permitted the government to assert a defense to prevent the disclosure of government information in discovery proceedings due to public policy concerns. The Court held that "public policy forbids the maintenance of any suit [relating to secret government services or clandestine matters] in a court of justice."[15] The action was brought by the administrator of the intestate, William A. Lloyd's, estate and sought to recover compensation for clandestine services that Lloyd completed under a contract with President Abraham Lincoln during the Civil War.[16] The contract stated that Lloyd was to "proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States."[17] In return for reporting facts back to President Lincoln,

12. CORN ET AL., *supra* note 2, at 671.
13. *See Totten*, 92 U.S. at 107 (1876).
14. *Reynolds*, 345 U.S. at 1.
15. *Totten*, 92 U.S. at 107.
16. *Id.* at 105.
17. *Id.* at 105–06.

Lloyd was ensured compensation of $200 per month.[18] But, after completion of his services for President Lincoln, Lloyd allegedly did not receive his contractually guaranteed payments.[19]

The Court denied Lloyd a fair legal proceeding to obtain his contractual remedy—monthly payment for his clandestine services—by concluding that the contractual information Lloyd sought to disclose in trial was confidential and could not be revealed publicly.[20] Fearing that exposing even the existence of such a contract in discovery might cause serious detriments to the public, the Court concluded that the secrecy of such a contract with the government "precludes any action for [] enforcement" because the "publicity produced by an action would itself be a breach of contract . . . thus defeat[ing] a recovery."[21] The Court ignored Lloyd's contractual rights and based its decision on public policy concerns. Comparing the government's evidentiary privilege to the priest-penitent privilege, the Court held that "suits cannot be maintained which would require a disclosure of the confidences of the confessional."[22] In doing so, the government was granted an incontestable privilege that denied any defense or redress for the injured petitioner.

Like the *Totten* bar's defense against the disclosure of government information in discovery, the state secrets privilege is an evidentiary privilege that can be raised as a defense by the government to prevent the disclosure of confidential information in civil cases. While the state secrets privilege is rooted in *Reynolds*'s interpretation of federal common law, the privilege has never been explicitly defined by the Supreme Court.[23] The privilege "has been held to apply to information that would result in 'impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments, or where disclosure would be inimical to national security.'"[24]

In *Reynolds*, the government appealed a Third Circuit judgment that ruled in favor of the respondents, who were widows of three civilian observers who were killed aboard a military aircraft on a flight to test secret electronic equipment.[25] The district court had ordered the government to produce an accident investigation report in discovery that related to a crash involving the death of the civilian observers.[26] The district court stated that it would determine whether the government information

18. *Id.* at 106.

19. *Id.*

20. *Id.* at 105.

21. *Id.* at 105–07.

22. *Id.*

23. CORN ET AL., *supra* note 2, at 704–05.

24. Fazaga v. FBI, 916 F.3d 1202, 1227 (9th Cir. 2019) (quoting Black v. United States, 62 F.3d 1115, 1118 (8th Cir. 1995)), *amended en banc by* 965 F.3d 1015 (9th Cir. 2020), *rev'd* 142 S. Ct. 1051 (2022).

25. *See* United States v. Reynolds, 345 U.S. 1, 1 (1953).

26. *Id.* at 5.

that the petitioners requested for disclosure in discovery contained privileged matters.[27] The government, however, declined to produce the documents that the court requested for review,[28] the court ruled that the government's refusal was negligent, and the Third Circuit affirmed.[29]

On certiorari review in the Supreme Court, the government asserted its evidentiary state secrets privilege to avoid producing the accident investigation report in discovery.[30] The government claimed that the accident report held privileged military secrets that could not be disclosed to the public.[31] After the government provided sufficient evidence that the report was vital to the country's national defense and classified information, the Court ruled that the government showed that "a reasonable danger existed that the report contained references to privileged military secrets."[32] The Court reversed the district court's order and allowed the government to avoid disclosing evidence that could be used to support Reynolds's case against the government. The Court left the respondents without a defense against the government's evidentiary privilege and without information that could strengthen their case.

Totten, *Reynolds*, and their progeny have continued to highlight the low threshold that the government is required to meet to invoke the state secrets privilege and avoid discovery of classified information. Courts continue to bar discovery and dismiss cases whenever the government raises concerns that the maintenance of a suit could disclose classified information, or information critical to the United States' national security and, therefore, valuable to a foreign intelligence agency.[33]

In *Tenet v. Doe*, a case heard by the Supreme Court nearly five decades after *Reynolds*, the Court held that the *Totten* bar prohibited "a self-styled Civil War spy from suing the United States to enforce its obligations under their secret espionage agreement."[34] The district court had previously ruled that the *Totten* bar did not bar the plaintiff's claims and that the plaintiffs were entitled to a trial on their due process claims.[35] On appeal, the Ninth Circuit affirmed the district court and denied a petition

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27. *Id.*

28. *Id.*

29. *Id.* at 1.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See* Al-Haramain Islamic Foundation v. Bush, 507 F.3d 1190 (9th Cir. 2007), *rev'g* 451 F. Supp. 2d 1215 (D. Or. 2006), *remanded to sub nom. In re* NSA Telecomm. Recs. Litig. (*In re NSA Recs. II*), 633 F. Supp. 2d 949 (N.D. Cal. 2009), *aff'd in part, rev'd in part* (*In re NSA Recs. III*), 671 F.3d 881 (9th Cir. 2011); *see also* United States v. Zubaydah, 142 S. Ct. 959, 963 (2022).

34. Tenet v. Doe (*Tenet IV*), 544 U.S. 1, 3 (2005), *rev'g* Doe v. Tenet (*Tenet II*), 329 F.3d 1135 (9th Cir. 2003), *aff'g in part and rev'g in part* Doe v. Tenet (*Tenet I*), No. C99-1597L, 2001 WL 35925897 (W.D. Wash. Jan 22, 2001).

35. *See Tenet I*, No. C99-1597L, 2001 WL 35925897

for rehearing en banc.[36] On certiorari review, the Supreme Court held that "[p]ublic policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[37]

By dismissing the case without affording the plaintiffs their day in court, the Court "failed to provide [the plaintiffs] with a fair internal process for reviewing their claims" against the CIA.[38] Further, the Court's dismissal of the suit protected the government from potential "graymail," or "individual lawsuits brought to induce the CIA to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations."[39] Similar to many state secrets privilege cases, the Court in *Tenet* favored the government's assertions over the plaintiff's guaranteed right to a fair trial under the Seventh and Fourteenth Amendments. The Court reasoned that the government needed to protect national security information from becoming public in trial, rather than allowing the disclosure of all facts of the case in trial and a fair judicial process.

The government in *Al-Haramain Islamic Foundation v. Bush*[40] was also able to invoke the state secrets privilege and obtain dismissal of a case under the theory that "the very subject matter of the lawsuits is a state secret."[41] Al-Haramain, a Muslim charity that the government labeled as a terrorist organization, learned that it had been subject to warrantless surveillance for two months in 2004.[42] Al-Haramain sued the government, claiming that it was the subject of warrantless surveillance in violation of the Foreign Intelligence Surveillance Act ("FISA"), the United States Constitution, and international law.[43] The government asserted the state secrets privilege to prevent the disclosure of classified information regarding the surveillance and moved to dismiss.[44] The trial court dismissed the government's motion and Ninth Circuit reversed, ruling that the "allowing Al-Haramain to reconstruct the essence of the document through memory" countenanced "a back door around [state secrets] privilege" that "would eviscerate the state secret itself."[45] By granting the government state secrets privilege over the information Al-Haramain sought to reveal in trial, the Ninth

36. *Tenet II*, 329 F.3d at 1135, *reh'g en banc denied*, Doe v. Tenet (*Tenet III*), 353 F.3d 1141 (9th Cir. 2004) (mem.).

37. *Tenet IV*, 544 U.S. at 7 (quoting Totten v. United States, 92 U.S. 105, 107 (1875))

38. *Id.* at 5.

39. *Id.* at 11.

40. 507 F.3d 1190, 1190 (9th Cir. 2007).

41. *Id.* at 1193.

42. *Id.* at 1194.

43. *Id.* at 1195; *see also* Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1812, 1821–1829, 1841–1846, 1861–1863, 1871–1874, 1881–1881g, 1885–1885c (2018).

44. *Bush*, 507 F.3d at 1195.

45. *Id.* at 1193; *see also* Jason A. Crook, *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*, 72 ALB. L. REV. 57, 11 (2009).

Circuit denied Al-Haramain information that could have provided the organization standing and a fair trial in accordance with the Constitution's guarantee of due process rights and an injured plaintiff's right to a remedy through the judicial process.[46]

The state secrets privilege has been invoked by the government at least seventy-eight times since the privilege was first recognized in *Reynolds* in 1953.[47] Without a legislative defense against the privilege, the government can continue to assert the state secrets privilege without check.

The Supreme Court's most recent case on the state secrets privilege, *United States v. Zubaydah*, once again favored the government's assertion of its evidentiary privilege.[48] *Zubaydah* concerned the appeal of a Ninth Circuit decision denying Abu Zubaydah, a detainee at the Guantánamo Bay Naval Base, his request for discovery of information "for use in a proceeding in a foreign . . . tribunal."[49] Zubaydah argued on certiorari review that the Ninth Circuit erred in its recognition of the state secrets privilege.[50] The district court had prevented subpoenas to obtain the depositions of CIA contractors, instead of complying with obligations under *Reynolds* to use fact-finding and other tools to safely admit information that could be critical to a case into discovery.[51] The Supreme Court reversed the Ninth Circuit and remanded the case with instructions to dismiss Zubaydah's discovery application.[52] In doing so, the Court allowed the government's state secrets privilege claim to prevail and permitted the government to hide information on Zubaydah's treatment at a CIA detention site in order to protect national security interests.[53]

Justice Gorsuch's dissenting opinion recognized the government's overreach in its use of the state secrets privilege.[54] Justice Gorsuch stated that the events that were subject to discovery occurred decades ago have long been declassified and should no longer be safeguarded as secrets.[55] Justice Gorsuch argued that when information has been made public or when state secrets can be separated from public information to allow public information to proceed through discovery, the executive cannot

46. *See* Crook, *supra* note 45, at 13.

47. *See* John W. Dean, *ACLU v. National Security Agency: Why the "State Secrets Privilege" Shouldn't Stop the Lawsuit Challenging Warrantless Telephone Surveillance of Americans*, FINDLAW (Jun. 16, 2006), https://supreme.findlaw.com/legal-commentary/aclu-v-national-security-agency-why-the-state-secrets-privilege-shouldnt-stop-the-lawsuit-challenging-warrantless-telephone-surveillance-of-americans.html [https://perma.cc/L462-VKMT]; *see also* Henry Lanman, *Secret Guarding: The New Secrecy Doctrine So Secret You Don't Even Know About It*, SLATE (May 22, 2006, 3:57 PM), https://slate.com/news-and-politics/2006/05/secret-guarding.html [https://perma.cc/QWY3-D2LY].

48. United States v. Zubaydah, 142 S. Ct. 959, 963 (2022).

49. *Id.*

50. *Id.* at 964.

51. *Id.* at 963.

52. *Id.* at 972.

53. *Id.* at 960.

54. *Id.* at 985. (Gorsuch, J., dissenting).

55. *Id.*

invoke its unchecked bar to the disclosure of classified information during discovery in civil cases.[56] *Zubaydah* recognized that the courts' procedures to evaluate a government agency's state secrets privilege claim vary depending on the claim and the court hearing the case. Congress should review state secrets privilege procedures to provide fairer opportunities for the judiciary's review of state secrets privilege claims.

II. INVOKING THE STATE SECRETS PRIVILEGE

By invoking the state secrets privilege, the government can prevent information from entering discovery by simply claiming that there is a reasonable danger that the disclosure of classified government information in a judicial proceeding will expose national security matters of either military, diplomatic, or intelligence issues.[57] To succeed on a state secrets privilege claim procedurally, the government must follow three steps that have been outlined in *El-Masri v. United States*.[58]

First, the court must determine "that the procedural requirements [outlined in *Reynolds*] for invoking the state secrets privilege have been satisfied."[59] *Reynolds* established a three-pronged analysis to decide whether a government agency could withhold information from discovery and potentially obtain dismissal of a case.[60] *Reynolds* requires that (1) the United States government be the party invoking the privilege because the privilege "belongs to the [g]overnment and . . . can neither be claimed nor waived by a private party[;]"[61] (2) the government provide a formal claim of the privilege "lodged by the head of the department which has control over the matter[;]"[62] and (3) the government's claim be made only "after actual personal consideration by" the head of the department which has control over the matter.[63] In considering the claim, the court must adhere to the Supreme Court's mandate that the privilege "not . . . be lightly invoked."[64]

If the first step of the *El-Masri* test (the three-pronged *Reynolds* analysis) is satisfied, the court then completes the final two steps of the *El-Masri* test.[65] "[T]he court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine[,]" and if the information at issue is "determined to be privileged, the ultimate question to be resolved is how the matter should proceed

56. *Id.*
57. *See* Crook, *supra* note 45, at 63–64.
58. El-Marsi v. United States, 479 F.3d 296, 304 (4th Cir. 2007).
59. *Id.*
60. United States v. Reynolds, 345 U.S. 1, 7–8 (1953).
61. *Id.*
62. *Id.*
63. *Id.* at 8.
64. *Id.* at 7.
65. El-Marsi v. United States, 479 F.3d 296, 304 (4th Cir. 2007).

in light of the successful privilege claim."[66] In assessing the last two steps of the *El-Masri* analysis, courts will consider whether the privileged information requested by the plaintiff to be revealed in the case's discovery can be disentangled from the non-privileged information to allow the litigation to proceed.[67]

In *Husayn v. Mitchell*, the Ninth Circuit requested that the district court consider whether in camera review, protective orders, restrictions on testimony, code names and pseudonyms, and other measures to permit discovery could be used to protect the government's privileged information while allowing the case to proceed.[68] The Ninth Circuit reinforced that the district court has an obligation under *Reynolds* to use fact-finding tools with respect to the case before justifying the rare step of dismissal.[69] Because the procedural requirements drafted in *Reynolds* allow the state secrets privilege to be invoked simply by the government's claim of necessity for closure, the *Reynolds* requirements favor the government's claim in the judicial proceeding. The government is required to make a claim of necessity against disclosure when invoking the state secrets privilege, but there are currently no requirements regarding the degree of specificity or certain information that the government needs to provide to the court to be awarded its evidentiary privilege against disclosure.

III. THE PROBLEM WITH EVIDENTIARY PRIVILEGE

A. Executive Carte Blanche

The *Reynolds* three-step guidelines used by the government to invoke the state secrets privilege do not provide the court with a sufficient opportunity to rule against potential abuses of the government's claim of evidentiary privilege. *Reynolds* provides the government with a guaranteed protection against the disclosure of information in discovery as long as "the circumstances [of a case] make clear that privileged information will be so central to the litigation that any attempt to proceed will

66. *Id.*

67. Husayn v. Mitchell, 938 F.3d 1123, 1123 (9th Cir. 2019), *rev'd sub nom.* United States v. Zubaydah, 142 S. Ct. 959 (2022).

68. *Id.*; *see also Update on State Secrets Litigation Under the Trump Administration*, WILEY (Feb. 2020), https://www.wiley.law/newsletter-Update-on-State-Secrets-Litigation-Under-the-Trump-Administration [https://perma.cc/RY2G-F7JD].

69. The Ninth Circuit held that the district court erred in quashing subpoenas to obtain depositions of independent CIA contractors after the U.S. government intervened and asserted the state secrets privilege because rather than quashing the subpoenas in toto, the district court should have "attempt[ed] to disentangle the privileged from nonprivileged information" sought for use in an ongoing international criminal investigation about the torture to which an enemy combatant was allegedly subjected in another country. *Husayn*, 938 F.3d at 1136; *see also* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1081 (9th Cir. 2010) (holding that the district court's hasty dismissal overlooked its "special burden to assure . . . that an appropriate balance is struck between protecting national security matters and preserving an open court system").

threaten that information's disclosure."[70] In asserting the state secrets privilege, the government is never required to submit a claim to the court with absolute certainty that the classified information requested by the plaintiff to be revealed in discovery must be prevented from disclosure due to national security reasons. By following the three simple steps in *Reynolds* to invoke the state secrets privilege, the government can withhold information from discovery that could be essential to the opposing party's case or ability to establish standing. Once the evidentiary privilege is granted by the court, the plaintiff is prohibited from asserting an otherwise viable claim using national security evidence that they believe is essential to their case.

In *Al-Haramain*, where a Muslim charity was under unwarranted surveillance by the government for two months, the government was able to invoke the state secrets privilege and dismiss the case under the theory that the sealed document needed to prove standing was a state secret.[71] Al-Haramain knew that it had been injured by the government, who had intercepted their telephone calls and other communications involving its members.[72] But Al-Haramain was unable to establish standing for its case due to the government's bar against disclosing evidence from sealed documents that were essential to its claim.[73] The government was able to assert the state secrets privilege without allowing the plaintiff to use available evidence to prove the reasoning behind or cause of its injury.[74] The state secrets privilege, therefore, can prevent plaintiffs from proving that they have suffered an injury-in-fact because they can't reference the classified government information or the documents at issue during discovery. The invocation of the state secrets privilege allows the government to completely circumvent the judicial process. By avoiding all disclosure of information relating to a claim, the government causes evidence to be unavailable to the opposing party, "as though a witness had died" or evidence had been lost.[75]

Similar to the *Al-Haramain* case, in 2013, the government was able to assert its evidentiary privilege and completely bar the plaintiff from establishing cause-in-fact in a case brought by an American and former Marine, Ibraheim Mashal.[76] Mashal brought suit against the government after learning that he could not board a flight home because he was on the Department of Homeland Security's ("DHS") No-Fly List.[77] The government never provided Mashal information regarding why he was placed on the No-Fly List and never gave him an opportunity to defend himself in a

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70. *See* Crook, *supra* note 45, at 70.

71. Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1190 (9th Cir. 2007).

72. *Id.* at 1195.

73. *Id.* at 1205.

74. *Id.*

75. Ellsberg v. Mitchell, 709 F.2d 51, 64 (D.C. Cir. 1983); *see also* Crook, *supra* note 45, at 73.

76. *See* Latif v. Holder, 28 F. Supp. 3d 1134 (D. Or. 2014).

77. *See id.* at 1140; *see also* Ann Koppuzha, *Secrets and Security: Overclassification and Civil Liberty in Administrative National Security Decisions*, 80 ALB. L. REV. 501, 501 (2016).

civil hearing prior to being placed on the list.[78] Mashal was contacted by the FBI after being questioned at the airport in 2010, and he was told that he could get off the No-Fly List if he became an informant for the FBI.[79] Mashal did not accept the FBI's offer and remained on the No-Fly List for four years, from 2010 to 2014.[80] Mashal joined a lawsuit in June 2011 with seventeen other plaintiffs who were similarly placed on the No-Fly List.[81] The plaintiffs claimed that their Fifth Amendment due process rights had been violated and that they were denied redress after not being allowed to board airplanes without notice regarding why they had been placed on the No-Fly List.[82]

The Ninth Circuit applied the *Al-Haramain* framework to the case that Mashal joined, *Latif v. Holder*, to determine whether the DHS could withhold from disclosing why a plaintiff was placed on the No-Fly List.[83] The Ninth Circuit held that two conditions must be satisfied in order for DHS to justify its nondisclosure of government information: "(1) the withheld reason is classified and truly implicates national security; and (2) reasonable mitigation measures are not possible without unduly implicating national security."[84] The Ninth Circuit reasoned that "[u]nless these conditions are satisfied, due process requires a full statement of reasons" why the plaintiff was added to the No-Fly List.[85] Because the executive and government agencies hold national security privilege over plaintiffs in judicial proceedings, the Ninth Circuit ruled that "given the national security concerns at issue," the government fulfilled its obligations for nondisclosure of information regarding the No-Fly List.[86] The Ninth Circuit found that DHS had taken "reasonable measures to ensure basic fairness to the plaintiffs and followed procedures reasonably designed to protect against erroneous deprivation of plaintiffs' liberty."[87] DHS was, therefore, granted privilege against disclosing classified information about the plaintiffs.

The *Reynolds* guidelines do not allow a court to question whether the

78. *See Latif*, 28 F. Supp. 3d at 1300–01; *see also* Koppuzha, *supra* note 77, at 501.

79. Christian Farr & BJ Lutz, *Case of Marine on No-Fly List Not Isolated: CAIR*, NBC 5 CHICAGO (Mar. 22, 2011, 7:56 PM), https://www.nbcchicago.com/news/local/mashal-marine-no-fly/1922872/ [https://perma.cc/S6ZF-CVAP] ("Mashal said the agents told him he ended up on the no-fly list because he exchanged emails about raising his children in an interfaith household with a Muslim cleric they were monitoring.").

80. *See* Abe Mashal, *I'm a Former Marine Who Was on the No Fly List for 4 Years—and I Still Don't Know Why*, VOX (June 30, 2016, 9:55 AM), https://www.vox.com/2016/6/30/12054124/no-fly-list-veteran [https://perma.cc/6NJ9-PHH8].

81. *See Latif*, 28 F. Supp. 3d at 1134.

82. *Id.*

83. Kashem v. Barr, 941 F.3d 358 (9th Cir. 2019).

84. *Id.* at 382–83 ("Mitigation measures may include, for example, disclosing the classified evidence to cleared counsel subject to a protective order or providing the complainant an unclassified summary of the information.").

85. *Id.* at 383.

86. *Id.* at 390.

87. *Id.*

government is making its claim to invoke the state secrets privilege in good faith. By asserting any reason for nondisclosure due to national security concerns, the government has met its burden. The government can win on its evidentiary nondisclosure claim without question from the court. The government is not required to show absolute certainty of its need to prevent disclosure of classified evidence in discovery—a power that is fundamentally unfair to plaintiffs who are provided no defense against the government's privilege.

B. Government Overreach and Denial of Due Process

When the government invokes the state secrets privilege and denies due process to a party by avoiding disclosure of information essential to the case, the government overreaches its enumerated executive power granted by the Constitution to protect the United States against foreign adversaries. By allowing the government to invoke the state secrets privilege, the court defies the system of checks and balances established by the Constitution's separation of powers.[88] The state secrets privilege allows the government to invoke its evidentiary privilege and to dismiss a case without providing the opposing party a defense or remedy against the government's bar against the disclosure of evidence in discovery. Even the strongest argument of necessity cannot overcome the state secrets privilege if the court is satisfied with the government's argument that it must protect issues of national security from disclosure.[89]

In *Fazaga v. FBI*, the Ninth Circuit explained that the "[s]tate secrets privilege may have constitutional core or constitutional overtones, but, at bottom, it is an evidentiary rule rooted in common law, not constitutional law."[90] The court further explained that *Reynolds* was "a purely evidentiary dispute" decided "by applying evidentiary rules."[91] Other courts have, however, recognized the government's invocation of the state secrets privilege as "constitutionally-inspired deference to the executive branch."[92] *Reynolds*, after all, was decided before the Federal Rules of Evidence were approved by Congress, and, therefore, did not recognize that the state secrets privilege could be rooted in the Constitution.[93] *In re NSA Telecommunications Records Litigation* established that "a strict dichotomy between federal common law and constitutional interpretation" is "misconceived because all rules of federal common law have some grounding in the Constitution."[94] Therefore, the

88. *See* U.S. CONST. arts. I, II, III.

89. El-Marsi v. United States, 479 F.3d 296, 305 (4th Cir. 2007).

90. Fazaga v. FBI, 965 F.3d 1015, 1020 (2020) (en banc), *rev'd*, 142 S. Ct. 1051 (2022).

91. *Id.* at 1045 (quoting Gen. Dynamics v. United States, 563 U.S. 478, 485 (2011)).

92. *In re* NSA Recs. Litig. (*In re NSA I*), 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008).

93. *Id.* at 1123.

94. *Id.*

evidentiary state secrets privilege is rooted in the Constitution and recent government abuses of the privilege have defied the constitutional system of checks and balances.

When courts allow the executive to exert the state secrets privilege with no check, courts favor the executive's national security power and privilege to protect intelligence information over the judiciary's power to adjudicate cases and controversies. As an extension of the state secrets privilege, courts have developed the mosaic theory to further preclude use of certain government information.[95] Under the mosaic theory, courts may allow the government to withhold trivial information that is not dangerous or critical to national security secrets unless combined with other information in discovery.[96] This unfair preference to enable government secrecy is contrary to the constitutional framework of the separation of powers as the privilege constrains the judiciary's fair and open due process system by denying the court power to check and overcome the executive's misuse of secrecy.

The criteria for the state secrets privilege are inherently unclear due to its aim to protect the confidentiality of national security matters. Even when a plaintiff claims necessity for discovery in a case, the unclear criteria of the government's evidentiary privilege often benefit the government's national security claim over any necessity of the plaintiff's judicial case. This unfairness continues to prevent the plaintiff from a fair judicial proceeding against the government when the court applies the mosaic theory in the discovery process. The mosaic theory can work contrary to the goal of discovery, which is to obtain facts and documents that support their claims, including identifiable harm to the plaintiff. The theory instead "act[s] merely as a convenient justification to shut down inquiry into the government's case."[97] By allowing the government to withhold "trivial or innocuous" information that may be found dangerous if combined with other information in discovery, the court prevents plaintiffs from introducing any evidence in discovery that may be essential to their case.[98]

In *CIA v. Sims*, for example, the Supreme Court allowed the CIA to withhold evidence about a government-sponsored psychological experiment as a "carte blanche to withhold information and operate with no accountability."[99] The case addressed the proper meaning of the term *intelligence sources* under the National Security Act of 1947, which gave the CIA statutory authority to protect its "intelligence

95. Christina E. Wells, CIA v. Sims: *Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 853 (2006).

96. *Id.* at 846 (Mosaic theory provides that "otherwise trivial or innocuous information [is prohibited from disclosure] because it might prove dangerous if combined with other information by a knowledgeable actor (especially a hostile intelligence agency).").

97. *Id.* at 848.

98. *Id.* at 846–47.

99. *Id.*; *see also* CIA v. Sims, 471 U.S. 159 (1985).

sources and methods."[100] The Court recognized the CIA's "wide-ranging authority to 'protec[t] intelligence sources and methods from unauthorized disclosure.'"[101] Similarly, in *Center for National Security Studies v. DOJ*, where plaintiffs filed a Freedom of information ("FOIA") action seeking the disclosure of information regarding detainees caught up in the investigation of the September 11 terrorist attacks, the Bush administration argued that the mosaic theory allowed for the blanket denial of FOIA requests due to national security concerns.[102] The D.C. Circuit agreed that the DOJ was justified in withholding national security information from the public's FOIA requests.[103] The unfettered discretion of mosaic theory to withhold information, however, was a complete exemption from judicial discovery. The government's assertion of the state secrets privilege and mosaic theory prevented a fair judicial proceeding and government transparency.

From 1977 to 2001, courts ruled on state secrets privilege cases fifty-one times.[104] Many cases arose relating to the September 11, 2001 attacks and the resulting "special interest" deportation proceedings.[105] *Detroit Free Press v. Ashcroft* is an example of the government's failed invocation of mosaic intelligence theory as justification to close public hearings due to national security concerns.[106] In *Detroit Free Press*, the plaintiff challenged the government's invocation of the mosaic theory, claiming that the blanket closure of immigration hearings was "a justification to close any public hearing completely and categorically, including criminal proceedings."[107] The Sixth Circuit ruled against the government, acknowledging that classification is a double-edged sword, decreasing public awareness and diminishing government accountability.[108] The Sixth Circuit recognized the government's invocation of mosaic theory to protect national security as a catch-all that allowed the government "to operate in virtual secrecy in all matters dealing, even remotely, with 'national security,' resulting in a wholesale suspension of First Amendment rights."[109]

The Founders intended for the judiciary to serve as a check against excessive government secrecy; Article II vested the executive power in a president of the United

100. *Sims*, 471 U.S. at 164 (quoting National Security Act of 1947, Ch. 343, § 102(d)(3), 61 Stat. 495, 498 (codified at 50 U.S.C. § 403(d)(3) (1982))). Congress transferred the CIA's responsibility over its intelligence sources and methods to the Director of National Intelligence in 2004. *See* National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, § 1001(a), sec. 102A(i), 118 Stat. 3643, 3651 (codified at 50 U.S.C. § 3024(i) (2018)).

101. *Sims*, 471 U.S. at 177 (alteration in original) (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980)); *see also* National Security Act of 1947 § 102(d)(3) (amended 2022).

102. Ctr. for Nat'l Sec. Studies v. U.S. Dept. of Justice, 331 F.3d 918, 924 (D.C. Cir. 2003).

103. *Id.* at 920.

104. Fuchs, *supra* note 1, at 135.

105. Wells, *supra* note 95, at 865.

106. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

107. *Id.* at 709–10.

108. *Id.* at 710.

109. *Id.* at 710.

States, and Article III vested the judicial power in the Supreme Court and inferior courts established by Congress.[110] The controls and limits on each branch were intended to ensure that the branches did not overreach their enumerated powers. The unchecked state secrets privilege clearly overreaches the executive's national security power as its use allows the executive to bypass the judicial process.[111] Even Congress has affirmed "its intent for the judiciary to act on [its judicial power in cases involving national security matters]."[112]

Congress's intent has been "illustrated by congressional endorsement of specific judicial review powers (including *in camera* review of secret documents) and Congress's refusal to restrain judicial inquiry when it has been exercised."[113] The legislature remains a check on the executive's evidentiary privilege. Congress should reevaluate the privilege and consider providing a legislative defense to it.

C. Unfairness to Plaintiffs and Lack of Executive Accountability

The purpose of the state secrets privilege is to protect government secrets relating to military or diplomatic matters that, if revealed, could be beneficial to foreign nations and cause danger to the United States' national security. But by allowing the executive to invoke the unchecked state secrets privilege in trial proceedings, the judiciary accepts the executive's claims without verifying their accuracy and enables the government to potentially hide bad behavior and avoid accountability for its actions. The judiciary enables the executive to assert an evidentiary privilege that could cover up negligence or illegal actions.

In *Totten*, when the executor of Lloyd's estate brought an action to recover compensation for services Lloyd had provided to the government, the government was able to assert the state secrets privilege to deny Lloyd's estate its contractual rights to payment for services Lloyd had completed for President Lincoln.[114] The

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110. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *see also id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

111. Under the Commander-in-Chief Clause of the U.S. Constitution, the President may direct the U.S. Army and Navy. U.S. CONST. art. II, § 2, cl. 1. This clause grants the executive power related to national security as the president has power to oversee America's foreign military and wartime relationships with other countries. *Id.* The President also has power under Article II to make treaties with other countries with the Senate's advice and consent. *Id.* cl. 2.

American intelligence agencies report directly to the President. Therefore, when courts allow the government to exert the state secrets privilege with no check, the court is favoring the executive's national security power and privilege to protect intelligence information over the judiciary's power to adjudicate cases and controversies.

112. Fuchs, *supra* note 1, at 132 (alteration in original).

113. *Id.*

114. Totten v. United States, 92 U.S.105, 106 (1875). The Supreme Court dismissed the case, holding that "the service stipulated by the contract was a secret service; the information sought was to be obtained

Supreme Court allowed the government to assert its evidentiary privilege to avoid disclosing the existence of the contract between the President and Lloyd, even though the Court of Claims previously found that Lloyd had completed his contractual duties, which would reward him payment from the government.[115] The invocation of the evidentiary privilege enabled the government to break its contract with no consequence after Lloyd sacrificed years of putting his life in danger by spying for the President during the Civil War. The Court reasoned that the very nature of a secret contract with the government provides no redress in the judicial process for the plaintiff if the government breaks its word: "Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter."[116] Therefore, no remedy existed for the injured plaintiff.

In *Tenet*, the Court again allowed the government to assert the state secrets privilege and avoid compensating the plaintiffs.[117] The plaintiffs, who were former spies, sued the government, alleging that the government failed to pay its promised sum for their espionage services.[118] The Court applied the Totten bar, dismissing the case because acknowledgment of the existence of the contract between the government and the plaintiffs could harm national security.[119] The plaintiffs were denied their due process rights without redress for their services or any accountability from the government.[120]

Without a defense against the state secrets privilege, the government can continue to assert its evidentiary privilege and cover up illegal actions with no liability. Not only does the unchecked privilege encourage potentially illegal conduct by the government, but it also allows the Court to violate the constitutional principle of the separation of powers. Without a defense against the executive's evidentiary privilege, the judiciary allows the executive to overreach the Court's power to decide cases and controversies, which disrupts the constitutional framework of checks and balances among the government's three branches.

IV. THE NEED FOR A CIVIL CIPA

The Classified Information Procedures Act was enacted by Congress in 1980 "[t]o provide certain pretrial, trial, and appellate procedures for criminal cases

clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed." *Id.*

115. *Id.* ("The Court of Claims finds that Lloyd proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President; and that, upon the close of the war, he was only reimbursed his expenses.").

116. *Id.*

117. Tenet v. Doe, 544 U.S. 1, 1 (2005).

118. *Id.*

119. *Id.*

120. *Id.*

involving classified information."[121] The CIPA aims to protect parties from having their cases dismissed due to concerns that national security interests will be disclosed during discovery. The CIPA provides guidelines for cases involving classified information and procedures that allow the disclosure of classified information during a case so that the case can proceed fairly through the judicial process.[122] Through the implementation of procedures that evaluate how to best protect and handle national security information during trial, the CIPA works to balance competing interests of defendants' due process rights with the government's need to protect classified information from public disclosure by providing alternative procedures for the disclosure of confidential information.[123] While the CIPA provides a solution to protect defendants' criminal due process rights in cases involving classified information, no legislation currently exists to protect plaintiffs' rights to civil remedies when the government invokes the state secrets privilege.

To guarantee civil plaintiffs a fair judicial proceeding when they request that classified information enter discovery, Congress must pass legislation that replicates the CIPA for civil proceedings. This Part highlights the benefits of the CIPA's pretrial, trial, and appellate procedures and proposes a similar legislative defense, or civil CIPA, that should be passed by Congress for use in civil cases when the government invokes the state secrets privilege. A civil CIPA would ideally serve as a defense for parties to raise when the government asserts its unchecked evidentiary privilege. The civil defense would provide pretrial, trial, and appellate procedures to evaluate whether classified government information could be disclosed in discovery or whether alternative disclosure measures would be necessary to allow the case to proceed through the trial process.

A civil CIPA would obviously differ from the criminal CIPA because civil cases do not have the same constitutional protections as criminal cases—civil cases are not protected by the Fifth Amendment's right to due process of law.[124] However, parties that bring civil cases in the American judicial system are still guaranteed a fair trial and remedy through the American judicial system under the Seventh Amendment.[125] Further, the American government was created as a system of checks and balances to establish accountability for branches that overreach their enumerated powers. Therefore, while a civil CIPA should not be an exact replication of the Fifth Amendment, due process-protected CIPA, a civil CIPA should provide plaintiffs with

121. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025, 2025 (1980) (codified as amended at 18 U.S.C. app. 3 §§ 1–16 (2018)).

122. *See id.*

123. *See id.*

124. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .").

125. *Id.* amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

protection that is less deferential to the government than the state secrets privilege. A civil CIPA should provide procedures that preserve the civil plaintiff's right to a fair trial and ensure government accountability.

A. History and Purpose of the CIPA

Governed by the Constitution's Fifth, Sixth, and Seventh Amendments, the "American trial process emphasizes transparency."[126] The Fifth Amendment guarantees that, in a criminal case, no person shall "be deprived of life, liberty, or property, without due process of law[.]"[127] The Sixth Amendment protects the right of an accused "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]"[128] The Seventh Amendment ensures that the right to a fair and impartial trial extends to civil cases.[129] While the Constitution promotes an open government, in 1980, Congress recognized the need to "procedurally regulate the admission of sensitive information in criminal courts" by enacting the CIPA.[130] The CIPA was introduced as a solution to balance secrecy of the executive necessary to protect the United States' national security with the constitutional aim for "transparency at the core of American justice."[131]

The CIPA was drafted as a legislative solution to provide the courts with a tool to "protect against the penetration of the intelligence community into the criminal justice system."[132] The CIPA's procedures attempt to create a "wall between the intelligence community and law enforcement in an effort to prevent collusion between the two that would undermine the legitimacy of the criminal justice system."[133] The CIPA's main use was to "prosecute espionage cases."[134] Prior to September 11, 2001, most cases involving the CIPA dealt with double agents.[135] The CIPA, therefore, became a tool to balance the maintenance of transparency to the public in the trial process and the "conflicting interests of prosecutors and spymasters."[136] Congress implemented the legislative tool to address "a very deep–seated conflict

126. Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 CARDOZO L. REV. 437, 439, 475 (2010) ("For terrorism and other cases, CIPA is a place where the secrecy necessary to protect sources and methods collides with the transparency at the core of American justice." To promote transparency in the trial process, "almost all American courts have galleries to welcome the media and the public.").

127. U.S. CONST. amend. V.

128. *Id.* amend. VI.

129. *Id.* amend. VII ("In Suits at common law, . . . the right of trial by jury shall be preserved . . . .").

130. Wesley S. McCann, *Addressing the Balance: Restructuring CIPA and FISA to Meet the Needs of Justice and the Criminal Justice System*, 80 ALB. L. REV. 1131, 1135 (2016).

131. *Id.* at 1145.

132. *Id.* at 1136.

133. *Id.*

134. *Id.* at 1137.

135. Radsan, *supra* note 126, at 438.

136. *Id.* at 437–38, 483.

between the concerns of the intelligence community on the one hand, and the Department of Justice on the other in enforcing the espionage statutes."[137]

In 2020, the Second Circuit recognized these competing concerns in *United States v. Al-Farekh*.[138] The district court addressed an appeal by Al-Farekh, a U.S. citizen who was arrested by the FBI in 2015 and convicted for, among other things, "using explosives, conspiring to murder U.S. nationals, conspiring to use a weapon of mass destruction, conspiring to bomb a U.S. government facility, and providing material support to terrorists."[139] Al-Farekh appealed the district court's judgment of conviction and claimed that the court abused its discretion when it denied defense counsel the appropriate security clearance to access motions filed by the government ex parte pursuant to section 4 of the CIPA.[140] Al-Farekh argued that the court violated his Fifth Amendment due process rights and Sixth Amendment right to a fair trial and right to cross-examine witnesses.[141] On appeal, the Second Circuit recognized that the CIPA's aim was to "to protect[ ] and restrict [ ]the discovery of classified information in a way that does not impair the defendant's right to a fair trial," and held that the district court's motions pursuant to the CIPA "fell squarely within the authority granted by Congress."[142]

By addressing conflicting interests between spymasters and prosecutors in criminal proceedings involving the executive's intelligence secrets, the CIPA aims to promote the defendant's constitutional due process rights during the discovery and trial process. While the CIPA is not "intended to make substantive changes regarding defendants' rights and the use of classified information," it is intended "to put in place procedural rules that facilitate early rulings on the admissibility of classified information alleged to be at issue and on the acceptability of substitutions for evidence found to be both sensitive and admissible."[143] If a party requests admission of classified information into a suit, the CIPA provides procedures for the court to evaluate the classified information and provide solutions to admit or substitute the information in order to allow the suit to proceed in a way that increases transparency in

137. LARRY M. EIG, CONG. RSCH. SERV., RL 89-172A, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 3 (1989). Eig noted that the Senate Subcommittee on Secrecy and Disclosure held hearings regarding national security information and the administration of justice. *Id.* at 3 n.8; *see also The Use of Classified Information in Litigation: Hearings Before the S. Subcomm. on Secrecy & Disclosure of the S. Select Comm. on Intel.*, 95th Cong. (1978).

138. 956 F.3d 99 (2d Cir. 2020).

139. *Id.* at 103.

140. *Id.* Under section 4 of CIPA, courts may "authorize the United States to delete specified items of classified information from . . . discovery . . . , to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove." 18 U.S.C. app. 3, § 4 (2018).

141. 956 F.3d at 114.

142. *Id.* at 106, 116 (alteration in original) (quoting United States v. Abu-Jihaad, 630 F.3d 102, 140 (2d Cir. 2010)).

143. EIG, *supra* note 137, at 13.

information shared between the parties in the litigation process.[144]

By providing solutions for classified information to be admitted, the CIPA enables a more fair and transparent trial process for the defendant while providing solutions to protect the government's national security secrets. Prior to the enactment of the CIPA, cases could easily be dismissed if the court found that national security information would be comprised during a suit.[145] However, by enacting the CIPA, Congress "emphasized that the Court should not undertake to balance the national security interests of the government against the rights of the defendant but rather that in the end remedies and sanctions against the government must be designed to make the defendant whole again."[146] In *United States v. Poindexter*, Judge Gessell emphasized the balance between preserving a defendant's constitutional rights to due process and a fair trial while affording adequate protection to national security concerns.[147]

The CIPA provides a valuable solution to criminal defendants by providing guidelines and working to provide legislative tools to facilitate a fair judicial proceeding and solutions to admit information relating to national security in the discovery process. The CIPA "is aimed at those defendants who were once entrusted with secrets and later faced prosecution for abusing that trust."[148] Intelligence officers facing criminal charges often fear exposure to foreign adversaries and the danger that could result from revealing evidence during public trials.[149] However, sometimes justice requires hearing evidence from an intelligence officer if they are the only source of potentially exculpatory information. The CIPA's pretrial, trial, and appellate procedures allow the court to admit national security information into discovery while providing methods to protect the information from full public disclosure. Because "no comprehensive law [currently] regulates the handling of classified information in the civil context," the CIPA should serve as a framework for legislation to provide courts procedures to safely handle classified information in civil

144. 18 U.S.C. app. 3.

145. EIG, *supra* note 137, at 2. During committee hearings about graymail legislation, Assistant Attorney General Philip Heymann stated, "In the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information," and, "The costs of such decisions go beyond the failure to redress particular instances of illegal conduct." *Graymail Legislation: Hearings Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intel.*, 96th Cong. 4–5 (1979) (statement of Philip B. Heymann, Assistant Att'y Gen., Criminal Division, United States Department of Justice).

146. EIG, *supra* note 137, at 14.

147. United States v. Poindexter, 698 F. Supp. 316, 319–21 (D.D.C. 1988) (order denying defendants' motion to declare provisions of the CIPA and the court's protective order issued thereunder unconstitutional).

148. Radsan, *supra* note 126, at 451; *see, e.g.*, United States v. North, 708 F. Supp. 389 (D.D.C. 1988) (order denying defendant's motion alleging that the CIPA was unconstitutional); United States v. Poindexter, 725 F. Supp. 13 (D.D.C. 1989); United States v. Smith, 780 F.2d 1102 (4th Cir. 1985) (en banc); United States v. Fernandez; 913 F.2d 148 (4th Cir. 1990); United States v. Libby, 429 F. Supp. 2d 18 (D.D.C.), *amended by* 429 F. Supp. 2d 46 (D.D.C. 2006).

149. Radsan, *supra* note 126, at 475.

proceedings.[150]

B. Procedural Guardrails and Legislative Review

The CIPA currently works to balance "protecting the defendant's rights" with "the needs of the state" when addressing the treatment of national security information in criminal prosecutions.[151] Congress enacted the CIPA to assist courts in assessing the "disclose or dismiss" dilemma in prosecution—whether a case needs to be dismissed to protect classified information from disclosure in discovery or "whether a prosecution [could] proceed that both protects the Executive['s] regards as sensitive to security and assures the defendant a fair trial consistent with the mandates of the Constitution."[152] By creating procedures to protect classified information in discovery while allowing a case to proceed through a fair judicial process, the government lessens the likelihood that defendants will threaten to "graymail," or publicly reveal sensitive information in trial.[153] The CIPA further aims to balance the defendant's Fifth and Sixth Amendment rights with the security need of the state to "reduce graymail's efficacy."[154]

In seven pages of legislation, the CIPA outlines security procedures on how to handle classified information in criminal proceedings. The Act first defines *classified information* and *national security* before applying the two terms to its procedural guidelines. Under the CIPA, *classified information* is "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data."[155] *National security* is defined as "the national defense and foreign relations of the United States."[156]

The Act then outlines procedural guidelines for introducing and protecting classified information during trial. In section 2, the CIPA guidelines state that, at any time after filing a claim, "any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution."[157] Section 3 then provides guidance on protective orders, stating that, if the United States provides the court with a motion to prevent disclosure of classified information, the court "shall issue an order to protect against [the] disclosure" of the

150. Justin Florence & Matthew Gerke, *National Security Issues in Civil Litigation: A Blueprint for Reform*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 252, 256 (Benjamin Wittes ed., 2009).

151. McCann, *supra* note 130, at 1131.

152. EIG, *supra* note 137.

153. 18 U.S.C. app. 3.

154. Radsan, *supra* note 126, at 447.

155. 18 U.S.C. app. 3, § 1(a) (2018).

156. *Id.* § 1(b).

157. *Id.* § 2.

information.[158] Sections 4 through 10 outline procedures on how the court can evaluate claims to prevent information from disclosure and if alternative security measures can be implemented in trial to protect the information while admitting it into discovery.[159] Upon sufficient showing from the government that classified information should not be disclosed in trial, the court may authorize the United States to "delete specified items of classified information from documents to be made available to the defendant through discovery . . . , to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove."[160] Under section 6, the court also has the capability of examining classified information in camera and ex parte.[161]

In addition to providing guidelines on how to handle classified information in judicial proceedings, CIPA sections 12 and 13 provide requirements for the government to report annually to Congress on any cases that it decides not to prosecute due to national security concerns.[162] Section 12(b) prescribes reporting requirements for the DOJ:

> When the Department of Justice decides not to prosecute a violation of Federal law pursuant to subsection (a), an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute. The findings shall include—
>
> (1) the intelligence information which the Department of Justice officials believe might be disclosed,
>
> (2) the purpose for which the information might be disclosed,
>
> (3) the probability that the information would be disclosed, and
>
> (4) the possible consequences such disclosure would have on the national security.[163]

By requiring the government to report to Congress on specific reasons why it has decided not to prosecute a case due to national security concerns, the legislature checks the executive to ensure that it doesn't abuse its evidentiary, national security

158. *Id.* § 3.
159. *Id.* §§ 4–10.
160. *Id.* § 4.
161. *See id.* § 6.
162. *See id.* §§ 12, 13.
163. *Id.* § 12(b).

privilege. Further, the government officials's written findings on the decision not to prosecute a case alerts the legislature of the executive's potential breach of its enumerated powers. The report also brings awareness to the legislature of judicial decisions that may need to be remedied through legislative action, rather than a court's decision.

CIPA section 13 provides further detail and additional guidelines on ensuring government accountability:

> (a) Consistent with applicable authorities and duties including those conferred by the Constitution upon the executive and legislative branches, the Attorney General shall report orally or in writing semiannually to the Permanent Select Committee on Intelligence of the United States House of Representatives, the Select Committee on Intelligence of the United States Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of Representatives on all cases where a decision not to prosecute a violation of Federal law pursuant to section 12(a) has been made.
>
> (c) The Attorney General shall deliver to the appropriate committees of Congress a report concerning the operation and effectiveness of this Act and including suggested amendments to this Act. For the first three years this Act is in effect, there shall be a report each year. After three years, such reports shall be delivered as necessary.[164]

Section 13 requires that the government report annually to specific congressional committees on its decision not to prosecute cases due to national security concerns. It also requires that the government report on the efficacy of the CIPA.

Section 13 also ensures that the CIPA is reviewed annually by both the judiciary and the legislature. Through an annual review of the efficacy of the legislation, the two government branches ensure that neither branch is overstepping its enumerated constitutional powers. The section 13 procedures guarantee that the CIPA is applied by the judiciary as a reasonable defense against the executive's abuse of the assertion of national security privilege doctrine, while ensuring that the legislature is aware of such potential abuses of the defense.

C. The CIPA's Imperfect Balancing Test

While the CIPA provides an invaluable solution for admitting necessary intelligence information into litigation during the criminal trial process, the CIPA

164. *Id.* § 13(c).

procedures are not perfect and sometimes unfairly favor the government's secrecy over the criminal defendant's request for disclosure of evidence. Through the "disclose-or-dismiss" dilemma, courts applying the CIPA evaluate whether a case can proceed through the CIPA procedures or whether the "government's substitution . . . does not do enough to protect sensitive information" to allow the case to proceed safely through the judicial process.[165]

Courts implementing CIPA rules often use a balancing test established in *Roviaro v. United States* when evaluating whether intelligence information can be disclosed in discovery during criminal trials.[166] Courts applying the *Roviaro* balancing test use different reasoning, on a case-by-case basis, to determine whether classified information can be admitted into discovery during the trial process.[167] Because the CIPA does not outline strict procedures that a court must follow to determine whether information is critical to national security, courts apply balancing tests such as the *Roviaro* test to their decisions regarding whether to admit classified information into discovery.[168] The CIPA, therefore, is not deferential toward the government in evaluating a defendant's request to admit information into discovery and would not be too deferential to the government if implemented in civil legislation through a civil CIPA.

The CIPA does not provide judges clear guidance on when classified information should be admitted into discovery or when information should be deleted or substituted. The *Roviaro* test provides a tool for courts to consider whether information needs to be withheld from discovery in order to protect the "identity of an informant from the defendant . . . to protect the safety of the informant and to aid law enforcement" or to "withhold secrets from defendants to protect an intelligence agency's sources and methods."[169] Because courts applying the *Roviaro* test use different reasoning to determine whether classified information can be admitted into discovery during the trial process,[170] CIPA is not automatically deferential toward the government in evaluating a defendant's request to admit information into discovery in the way that state secrets privilege is for civil plaintiffs.

Roviaro held that the government must at times disclose informant information in order to protect the access to a fair trial for the defendant.[171] *Roviaro*'s progeny established varied results when applying the *Roviaro* balancing test to the defendants'

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165. Radsan, *supra* note 126, at 451.

166. United States v. Aref, 533 F.3d 72 (2d Cir. 2008) ("We therefore adopt the *Roviaro* standard for determining when the Government's privilege must give way in a CIPA case. Other circuits agree.").

167. *See id.*; *see also* United States v. Yunis, 867 F.2d 617 (D.C. Cir.1989); United States v. Smith, 780 F.2d 1102 (4th Cir.1985) (en banc).

168. *Yunis*, 867 F.2d at 625.

169. Radsan, *supra* note 126, at 467.

170. *Aref*, 533 F.3d 72.

171. McCann, *supra* note 130, at 1143; *see also* Roviaro v. United States, 353 U.S. 53, 60–61 (1957).

requests for classified information to be admitted into discovery. For example, in *United States v. Yunis*, the D.C. Circuit applied a "relevant and helpful" standard to determine whether information should be admitted in the trial process.[172] The D.C. Circuit ruled that "[c]lassified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, [but requires that a defendant] is entitled only to information that is at least 'helpful to the defense of [the] accused[.]'"[173] In *United States v. Smith*, where a former Army employee was charged with selling classified information to the Soviet Union, and sought to support his defense with information about his participation as a CIA double agent, the Fourth Circuit applied the *Roviaro* standard and denied Smith's request to admit information into discovery.[174] The *Smith* court decided that national security concerns precluded introducing classified information to the case.[175] The court applied the "relevant and helpful standard" to determine whether the defendant could show that the classified information he requested to be admitted at trial was "relevant and helpful to the defense . . . or . . . essential to a fair determination of a cause."[176]

Roviaro established that, in situations "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."[177] However, "if the Government withholds the information," the court may "dismiss the action" instead of requiring disclosure.[178] Therefore, the CIPA does not provide a perfect, uniform solution for each court to ensure transparency in the fair trial process, but it's a start to providing the defendant with the opportunity for a fair trial and fair discovery process. When the government invokes the state secrets privilege in civil cases, plaintiffs cannot meaningfully defend themselves without their requested information that is barred from discovery. By implementing the CIPA in a civil context, plaintiffs will have greater opportunities to bring intelligence information into their cases through safe trial procedures that balance protecting government secrecy against enabling government transparency and fair judicial processes.

D. Necessary Congressional Action

Currently, civil plaintiffs who request classified information be admitted at trial, either to establish a defense or standing, do not have a defense against the executive's

172. *Yunis*, 867 F.2d at 623.
173. *Id.*
174. United States v. Smith, 780 F.2d 1102 (4th Cir. 1984) (en banc).
175. *Id.* at 1109–10.
176. *Id.* at 1107.
177. Roviaro v. United States, 353 U.S. 53, 60–61 (1957).
178. *Id.*

assertion of the state secrets privilege. It is imperative that Congress enact a legislative defense against the executive's unchecked evidentiary privilege. The defense should provide fair guidelines and procedures for the court to follow when it receives a request from a plaintiff to admit classified information into discovery. A civil CIPA should fairly evaluate a plaintiff's request through trial procedures that are not automatically deferential to the government. A civil CIPA should provide a check against the executive's potential abuse of power when it asserts its national security privilege to hide information from discovery.

A civil CIPA should provide procedures to more fairly evaluate a plaintiff's request to obtain classified information and admit such information into a case's trial process by determining whether preventive measures could be taken to protect the classified information during the trial process. The defense should provide the court with tools to ensure that an injured plaintiff has a right to remedy their injury through a fair and impartial trial process as guaranteed by the Constitution's Fourteenth Amendment. The legislative solution should be similar to the CIPA, which provides procedures for criminal cases involving the disclosure of classified information that the plaintiff's need to make their case. A civil CIPA should include minor revisions, including applying the Federal Rules of Civil Procedure to its guidelines instead of the Federal Rules of Criminal Procedure. A civil CIPA should provide the judiciary with legal tools to facilitate the safe admission of classified information into discovery and to provide plaintiffs with a defense against the government's currently unchecked assertion of the state secrets privilege.

While the CIPA currently only applies to criminal cases that involve classified government information, the format of the CIPA's pretrial, trial, and appellate procedures can be transferred and applied to civil cases. Although plaintiffs in civil proceedings are not awarded the same Fifth Amendment due process protections that plaintiffs are awarded in criminal proceedings—civil plaintiffs do not have the same due process guarantees which protect life and liberty without deprivation of due process of law—civil plaintiffs are still provided procedural, civil due process under the Fourteenth Amendment. Plaintiffs cannot be denied protection of their rights under the laws of their country and State. Further, under the Seventh Amendment, the right to a trial by jury is preserved for cases at common law. Therefore, plaintiffs are constitutionally guaranteed a remedy through the American judicial system when their rights are breached. Through a civil CIPA's pretrial and trial procedures, which would protect national security information while allowing its entry into case discovery, a civil CIPA should protect an injured civil plaintiff's right to a remedy through the American judicial process.

The CIPA is vague in its guidelines and proceedings. Implementing a civil CIPA will provide a legal tool for courts to admit classified information into discovery to aide a plaintiff's case, without being too deferential to the government. The

CIPA gives the court leeway to balance competing interests of the spymaster and the judiciary when determining whether classified information should be admitted in discovery. Courts evaluating whether classified information should be admitted into criminal cases apply a CIPA balancing test of determining whether classified information is "relevant and helpful to the defense . . . or . . . essential to a fair determination of a cause," which is not a strict standard.[179] Therefore, applying the same standard and balancing test to civil proceedings will not cause civil cases involving national security concerns to become too deferential toward the plaintiffs when the government asserts the state secrets privilege, favoring the government or defendant.

Under a civil CIPA, courts should first follow pretrial procedures as outlined in the CIPA to determine whether the classified information is admissible or whether procedures can be taken to safely admit the information through alternative measures. Similar to the guidelines under CIPA section 6, the court should conduct a hearing to determine the "use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding."[180] In essence, the court's consideration is a case-by-case balancing test to determine whether the classified information at issue is more critical to the plaintiff's defense than the protection of the national security information. The section 6 process is critical to the plaintiff's defense against the government's assertion of state secrets because it outlines procedures for the safe disclosure of classified information if the court rules that the information is more critical to the plaintiff's defense than the national security concerns. These section 6 steps uphold the plaintiff's right to a fair trial that could provide a remedy for their breached civil right.

Replicating CIPA section 6(c) in a civil CIPA would provide "Alternative Procedure[s] for Disclosure of Classified Information."[181] These alternative procedures include "substitut[ing] for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove;"[182] the court may allow the "substitution for such classified information of a summary of the specific classified information;"[183] the court may also allow the sealing of records in in camera hearings to allow the court to conduct hearings in chambers, without public view.[184]

The CIPA's sections 8 and 10 trial procedures on safely admitting classified information into discovery should be replicated in a civil CIPA. CIPA section 8 provides guidelines on introducing classified information into trial, to ensure that only the classified information determined to be admissible in pretrial procedures is

179. *Id.* at 1107.
180. 18 U.S.C. app. 3 § 6(a) (2018).
181. *Id.* § 6(c).
182. *Id.* § 6(c)(1)(A).
183. *Id.* § 6(c)(1)(B).
184. *Id.* § 6(d).

admitted in trial. CIPA section 10 outlines steps for the prosecutor to notify a defendant before the start of trial regarding "the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense."[185] By implementing section 10 in civil CIPA, the court would ensure that the plaintiff isn't revealing classified information that has been prohibited from discovery—a check by the judiciary to protect the executive's possible national security concerns.

The CIPA's annual congressional reporting requirements should also be replicated in a civil CIPA to provide a check on the judiciary to ensure they do not abuse their trial tools. In section 13 of CIPA, the legislation outlines procedures in which "the Attorney General shall report orally or in writing semiannually to the Permanent Select Committee on Intelligence of the United States House of Representative, the Select Committee on Intelligence of the United States Senate and the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of Representatives."[186] The section also requires the Attorney General to deliver a report "concerning the operation and effectiveness" of CIPA during each of the first three years in which the Act is in effect and then as necessary.[187] Similar language implemented in a civil CIPA will provide a check against any potential abuses of a civil CIPA defense by the judiciary. The legislature would have the opportunity to amend the civil CIPA legislation if the defense started to be abused.

While a civil CIPA can largely replicate the current criminal CIPA, courts first need to consider whether a plaintiff's civil case is justiciable before it can apply a defense against the government's assertion of its state secrets privilege. Because the state secrets privilege is a defense that can be asserted by the executive in judicial proceedings, there is potential that a suit brought by a plaintiff relates to a political issue against the executive. A plaintiff may, for example, request that intelligence information is released in trial for a political purpose in order to exculpate the executive. Under the Constitution's Political Questions Doctrine, however, the judiciary cannot decide political questions—to do so would overreach their power to decide cases and controversies, by stepping into the power of the executive branch to decide political questions.[188] *Baker v. Carr* established that "[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[189] But, for a case to be litigated or remedy to be awarded by the judiciary, a right must have been violated—a solely political disagreement

185. *Id.* § 10.

186. *Id.* § 13(a).

187. *Id.* § 13(c).

188. Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

189. *Id.* at 208 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

may not be at stake.[190] Under the separation of powers, the Constitution grants the executive and Congress the power to decide political issues.[191] Therefore, a case is only justiciable if the plaintiff has standing for redress from an injury that is not an injured political right. As long as a civil plaintiff's case is not political and is otherwise justiciable, then the judiciary may provide a civil CIPA defense against the government's invocation of the state secrets privilege.

By adopting a civil CIPA, Congress will provide the judiciary a legal tool for courts to provide plaintiff's a defense against the government's unchecked assertion of the state secrets privilege.

CONCLUSION

While American democracy was built on the concept of government openness to protect the individual liberties of its people, in judicial proceedings involving classified information, the courts have inconsistently balanced competing interests of government transparency versus national security protections when addressing the "disclose-or-dismiss" dilemma. In civil proceedings involving national security secrets, courts are often deferential to the executive in agreeing to prevent disclosure of classified information into discovery. While the state secrets privilege seeks to protect the American government's national security secrets, it is far from a perfect judicial defense. Since it was established in *Reynolds*, the boundless evidentiary privilege has often left American citizens who are injured by improper intelligence or national security actions with no redress.

The state secrets privilege is too easy to raise and affords no judicial remedy for parties bringing suit against the government. Currently, no system of checks and balances exists between the government and the judiciary when the government asserts the state secrets privilege. Further, the state secrets privilege is unfair in its application as it encourages potential illegal conduct by the government; the privilege affords no accountability for the government's actions, which could be covering up their possible abuse or illegal conduct by the government.

Through procedural guidelines and legislative review, however, the CIPA successfully protects defendants' due process rights when the government asserts its evidentiary privilege to prevent information from disclosure in trial. Congress must pass legislation outlining a civil CIPA to provide a necessary defense for plaintiffs against the government's unchecked application of the state secrets privilege in civil proceedings.

190. *Id.* at 200–01.
191. *Id.* at 186.